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No. 95-480

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FIDELITY AND CASUALTY COMPANY OF NEW YORK, THE HANOVER INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

versus

SIDNEY N. AHYSEN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Louisiana

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case involves pretrial motion practice and all issues are still subject to appellate review at the state level. The appeal court decision, denying writs, recognized that there were numerous questions of material fact preventing the court from granting the requested summary judgment. (App. A). Moreover, the court recognized that relators may reurge this issue in the event of an adverse judgment. (App. A). The Louisiana Supreme Court, apparently recognizing that the case was not ripe for appeal, denied writs. (App. B). Importantly and contrary to Petitioners' assertions, Plaintiffs did not concede that these claimants were covered by Longshore Harbor Workers' Act 33 U.S.C. 901 *et seq.* (LHWCA) in the lower courts. Whether each and every claimant is covered by the LHWCA is a factual matter to be decided at the trial on the merits.[1]

Respondents were workers for Todd Shipyards (Todd), and other shipyards, between the years 1938 and approximately 1976. In the course of their duties they were regularly exposed to asbestos dust resulting in severe and life threatening injuries. Among others, Respondents have sued certain employees of Todd (executive officers) and their insurers, as allowed by Louisiana law. Respondents' pre-1976 exposures, gave rise to their substantive tort rights to bring these co-employee actions

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[1] As plaintiffs indicated in their brief to the Louisiana Supreme Court, the record is completely void of any evidence which would indicate which compensation scheme has jurisdiction over these cases, or when the individual plaintiffs' onset of disability began.

under Louisiana law. In 1990, the Louisiana Workers Compensation law was amended to eliminate the dual remedy compensation, and exclusive compensation coverage, under the LHWCA. In any event, the subsequent amendment to Louisiana Workers Compensation law cannot effect a change of substantive right.

In asbestos cases, the law is clear. The court is to apply the law in effect at the time of the injury producing harm. Once the plaintiff is harmed, he has acquired a vested property right (tort action) that may not constitutionally be divested.

SUMMARY OF ARGUMENT

1) The judgments that Petitioners seek relief from merely denied summary judgment and retained all issues for trial. The judgment denying summary judgment was not a final judgment. Therefore, these issues are not ripe for this Court's intervention.

2) For the sake of argument, Respondents will assume these workers are all covered by LHWCA. Since 1972, an area of concurrent jurisdiction existed whereby an injured harbor worker had the choice of federal law or state law in the dockside area, where federal compensation law was extended under the 1972 amendments to the LHWCA. Before 1972, state law was exclusive in this dockside area. During this time, Louisiana law allowed, in addition to traditional workers compensation remedies, in certain circumstances, an injured worker to also bring an action against a co-employee for occupational diseases involving exposure to work place toxins prior to 1976, the date that the co-employee rights against manufacturers in negligence were eliminated. A plaintiff may still maintain these actions. In 1990, the state statute was amended to make the LHWCA the exclusive compensation remedy, an area which had heretofore fallen under concurrent federal and state jurisdiction.

3) The law in place at the time of exposure to asbestos dust is the applicable law in tort cases, as opposed to worker's compensation cases.

ARGUMENT

1. Question Presented Is Not Important

The question presented in this case regards a trial court's refusal to grant summary judgment forcing the Petitioner to re-assert its argument at trial. A refusal of this writ of certiorari will not affect this issue. The Louisiana Supreme Court's disposition on the writ application states that writs were denied. (App. B). The Louisiana Supreme Court's decision was made after the Louisiana Fifth Circuit Court of Appeal had thorqughly analyzed the issue. The Louisiana Fifth Circuit Court of Appeal stated:

> Consequently, **we see numerous questions of material fact** involved at this time preventing the granting of summary judgment in favor of relators.
>
> We further are of the opinion that this decision is governed, in part, by *Cole v. Celotex Corporation*, 599 So.2d 1058 (La. 1992) and writs are refused at this time also because **relators may reurge this issue** in the event of an adverse judgment. (App. A). (Emphasis Added)

This question does not warrant the Louisiana Supreme Court's review, much less the review of U.S. Supreme Court.

Petitioners rely on 28 U.S.C. § 1257(a) for jurisdiction in this case. However, the United States Supreme Court's jurisdiction to review a state court's decision is generally limited to final judgments rendered by the highest court of the state in which the decision may be had. *Flynt v.*

Ohio, 451 U.S. 619 (1981). In the instant case, it is undisputed that the petitioners "may reurge this issue in the event of an adverse judgment." (App. A).

If the issue was not presented to state courts in such a manner that it was necessarily decided by the highest state court, the U.S. Supreme Court would have no power to consider the issue. *Street v. New York*, 394 U.S. 576 (1969). Again, this issue is not ready for review by the Louisiana Appellate or Supreme Court, much less the U.S. Supreme Court.

The requirement that final judgment or decree be rendered by the highest court of the state before the U.S. Supreme Court may intervene in state litigation is not a mere technicality to be easily scorned, but an important factor in the smooth working of our federal system. *Montgomery Buildings Const. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952).

Moreover, the state law was amended in 1976 and again in 1990 to eliminate both executive officers' liability and concurrent jurisdiction. Therefore, the question is moot and does not warrant U.S. Supreme Court review.

2. Under Pre-1976 Law, There is Concurrent Jurisdiction

On the other hand, in workers compensation cases the relevant consideration is the date the worker became disabled. *Smith v. Gretna Machines and Ironworks*, 646 So.2d 1096, 1098 (La. App. 5th Cir. 1984); *Dempster v. Avondale Shipyards, Inc.*, 643 So.2d 1316 (La. App. 5th Cir. 1994); *Stelly v. Overhead Door Company of Baton Rouge*, 646

So.2d 905, 910 (La. 1994). In the ***present*** case, no claim for workers compensation has been filed.

In addition, if amendments to the Louisiana Workers Compensation law could work to divest Respondents of substantive rights acquired at the time of exposure, the law would be unconstitutional under both the federal and state constitutions and it should surely not be so construed. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). A cause of action in tort is a property right; once a property right accrues it becomes a vested property right that may not constitutionally become divested. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). In asbestos cases, a cause of action accrues when the victim breathes the injury producing dust. See *Cole*. Therefore, once a plaintiff breathes the dust, he has sustained an injury producing harm, a tort action, and that vested property right that may not be constitutionally divested.

Petitioners' discussion of preemption (Brief pages 9-13) misses the point. Where two statutory schemes, one state and one federal are viewed as concurrent, preemption was not intended. In concurrent jurisdiction cases, the parties take the state law as it is and the federal law as it is. If the plaintiff chooses federal law, he must abide by it; if he chooses state law, he must abide by it. ***This is what concurrent jurisdiction means.***

If preemption occurs the laws are no longer concurrent. This was the meaning recognized by the Louisiana Supreme Court in the *Poche* case. *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976).

Respondents in the present case have asserted no claims under the LHWCA. Instead, they are pursuing

state tort claims which were fully allowed when their exposure took place and their property right was vested. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992).

It should be remembered that before the 1972 amendments to the LHWCA, Louisiana law, with its co-employee liability, had exclusive jurisdiction in the dock-side area relevant to the present case. It was certainly not Congress' intent to displace this existing law in 1972. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976).

In fact, in the case of *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), this Court held that preemption did not take place between the two statutory schemes.

> We, therefore, find no sign in the 1972 amendments . . . that Congress worked to alter the accepted understanding that federal jurisdiction would co-exist with state compensation laws in that field in which the latter may constitutionally operate.

Sun Ship, 447 U.S. at 722.

3. The Controlling Law Is That Which Is In Effect At The Time Of Exposure

The controlling point in time ***in tort actions*** is "exposure" to the injury producing harm. *Coates v. A.C. and S., Inc.*, 844 F.Supp. 1126, 1131 (E.D.La. 1994); *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). Central to asbestos cases is the fact that they are characterized by lengthy latency periods, as much as several decades. Because of this, the traditional concepts of "wrongful act and resulting damages" makes little sense in this context; instead, the courts

have looked to the "key relevant events" (accident) in fixing the time periods applicable. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). The courts have further construed this as the date of the "accident," which in an asbestos case would be synonymous with exposure (all pre-1976). *Koker v. Armstrong Cork, Inc.*, 804 P.2d 659 (Wash. App. 1991); *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). It is the exposure which produces the injury, no matter when this occurs. The significant event is the exposure without which there would be no injury. *Coates v. A.C. and S., Inc.*, 844 F.Supp. 1126, 1131 (E.D. La. 1994); *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992).

CONCLUSION

The judgment from which Petitioners seek relief is not a final judgment; therefore, this issue is not ripe for this court's intervention. For this reason, as well as all other reasons heretofore stated, the writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

DOUGLAS ABADIE, ET AL.

VERSUS

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.

NO. 95-C-284

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

WRITS REFUSED.

We find that the claims of plaintiffs against relators/defendants, the insurers of Todd Shipyards, are speculative at this time because respondents/plaintiffs allege that their illness and/or disabilities were contracted by them during the "1970s" and "1980s." Consequently, we see numerous questions of material fact involved at this time preventing the granting of summary judgment in favor of relators.

We further are of the opinion that this decision is governed, in part, by *Cole v. Celotex Corporation*, 599 So.2d 1058 (La.1990) and writs are refused at this time also because relators may reurge this issue in the event of an adverse judgment.

Gretna Louisiana, this 27th day of April, 1995.

/s/ FB
JUDGE FRED S. BOWES

/s/ TCW, Jr
JUDGE THOMAS C. WICKER, JR.

/s/ SG
JUDGE SOL GOTHARD

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GRETNA APR 27 1995 19__

/s/ Peter J. Fitzgerald, Jr.
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COURT OF APPEAL,
FIFTH CIRCUIT

THE SUPREME COURT OF THE STATE OF LOUISIANA

DOUGLAS ABADIE, ET AL

VS. NO. 95-CC-1326

METROPOLITAN LIFE INSURANCE COMPANY, ET AL

IN RE: Todd Shipyards Corporation; Hanover Insurance Co.; Fidelity & Casualty Inc.Co.NY; Travelers Insurance Co.; – Defendant(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fifth Circuit, Number 95-CW-0284; Parish of Jefferson 24th Judicial District Court Div. "J" Number 424-010

June 23, 1995

Denied.

PFC
WFM
JLD
JCW
JPV

JOHNSON, J. not on panel.

Supreme Court of Louisiana
June 23, 1995

/s/ Fran J. LaBranche, Jr.
Clerk of Court
For the Court